Ng Chee Kui & Anor v Fast Aid Medical (M) Sdn Bhd & Ors and another appeal

HIGH COURT (SHAH ALAM) — CIVIL SUIT NOS BA-22NCVC-741–12 OF 2017 AND BA-22NCVC-138–03 OF 2018
SM KOMATHY J
2 DECEMBER 2019

Contract — Agreement — Sale and purchase agreement — Sale of land — Whether there was consideration — Whether there was assignment of debt owing — Whether plaintiffs entitled to seek specific performance — Whether plaintiffs entitled to liquidated damages

Civil Suits 22NCVC-741–12 of 2017 ('Suit 741') and 22NCVC-138–03 of 2018 ('Suit 138') were consolidated and heard together. This case concerned a piece of agricultural land ('the land') which belonged to Moo Ooi Peng ('Moo'). Moo and her son, Woo Mun Kit ('Woo') were co borrowers of a loan facility offered by Bank Pertanian Malaysia Bhd ('Agro Bank') for the purpose of financing the purchase of the land. Moo and her late husband, and Abdul Aziz bin Mohd Daud ('Abdul Aziz') were directors in a travel and tour company known as Cherry Bird Travel & Tours Sdn Bhd ('Cherry Bird'). Cherry Bird took a loan from Standard Chartered Bank, and the same was guaranteed by Moo, her husband and Abdul Aziz. In November 2014, Abdul Aziz settled the loan facility owed by Cherry Bird to Standard Chartered Bank amounting to RM150,000 as the bank had initiated court proceedings against Cherry Bird and the guarantors. Abdul Aziz had resigned from Cherry Bird and was a director with Fast Aid Medical (M) Sdn Bhd ('Fast Aid') at the material time. On 30 March 2015, Moo and Woo went to Messrs Jasbeer, Nur & Lee's office and signed, inter alia: (a) a friendly loan agreement of RM150,000 ('the loan agreement') between Fast Aid as the lender and Moo as borrower; and (b) a sale and purchase agreement between Moo as seller and Fast Aid as purchaser of the land for RM1m. Subsequently, on 1 February 2017, Fast Aid entered into a sale and purchase agreement with Ng Chee Kui and Ng Chee Cheong ('the Ngs') to sell the land for RM1,803,960. The agreement declared that Fast Aid was the beneficial owner of the land by virtue of the latter's agreement with Moo. The Ngs paid Fast Aid RM180,396 under the agreement and the balance purchase price of RM1,623,564 was deposited with their solicitors as stakeholder. In February 2017, Agro Bank notified Moo that Jasber, Nur & Lee had requested for a redemption statement for the redemption of the Agro Bank loan facility vis a vis the land. Moo and Woo informed Agro Bank that there was no agreement whatsoever by them to sell the land to Fast Aid and/or any party and instructed Agro Bank not to release the redemption statement. As a result, Fast

Aid was unable to proceed to complete the sale and purchase agreement with the Ngs. Whereupon, in December 2017, the Ngs instituted Suit 741 for specific performance of the sale and purchase agreement between them and Fast Aid and added Moo and Woo as co defendants. In March 2018, Moo and Woo instituted Suit 138 to nullify the loan agreement and sale and purchase agreement with Fast Aid.

Held:

(1) Sections 91 and 92 of the Evidence Act 1950 did not preclude Moo/Woo giving oral evidence to show that they did not in fact receive the RM150,000 from Fast Aid. Moo's promise in the loan agreement to repay the loan and her promise to sell the land to Fast Aid if she defaulted in the repayment of the loan, were thus made without consideration. The two agreements between Moo/Woo and Fast Aid would be void unless there was evidence to show Abdul Aziz had assigned Moo's debt to Fast Aid. Fast Aid's claim that there was an assignment was unsubstantiated. In fact, the evidence was to the contrary. It followed that the sale and purchase agreement and loan agreement between Moo/Woo and Fast Aid were void and unenforceable for lack of consideration (see paras 32, 34 & 38).

(2) Fast Aid had no legal or beneficial interest in the land and could not therefore sell it to the Ngs. The Ngs could not thus seek specific performance of the sale and purchase agreement with Fast Aid, and could only seek for a refund of all monies paid under the agreement. Fast Aid also failed to discharge its burden of proving that the Ngs claim for liquidated damages in the sum of RM180,396 was excessive, exorbitant or unreasonable. In the premises, the claim of the Ngs for liquidated damages was allowed (see paras 41 & 46).

[Bahasa Malaysia summary

Guaman Sivil 22NCVC-741-12 Tahun 2017 ('Guaman 741') dan 22NCVC-138–03 Tahun 2018 ('Guaman 138') digabungkan dan didengar bersama. Kes ini berkaitan sebidang tanah pertanian ('tanah') milik Moo Ooi Peng ('Moo'). Moo dan anaknya, Woo Mun Kit ('Woo') adalah peminjam bersama kemudahan pinjaman yang ditawarkan oleh Bank Pertanian Malaysia Bhd ('Agro Bank') untuk tujuan membiayai pembelian tanah tersebut. Moo dan arwah suaminya, dan Abdul Aziz bin Mohd Daud ('Abdul Aziz') adalah pengarah dalam syarikat pelancongan yang dikenali sebagai Cherry Bird Travel & Tours Sdn Bhd ('Cherry Bird'). Cherry Bird mengambil pinjaman dari Standard Chartered Bank, dan yang sama dijamin oleh Moo, suaminya dan Abdul Aziz. Pada bulan November 2014, Abdul Aziz melunaskan kemudahan pinjaman Cherry Bird kepada Standard Chartered Bank berjumlah RM150,000 kerana bank telah memulakan prosiding mahkamah terhadap Cherry Bird dan penjamin. Abdul Aziz telah meletak jawatan dari Cherry Bird

dan merupakan pengarah di Fast Aid Medical (M) Sdn Bhd ('Fast Aid') pada waktu material. Pada 30 Mac 2015, Moo dan Woo pergi ke pejabat Tetuan Jasbeer, Nur & Lee dan menandatangani, antara lain: (a) perjanjian pinjaman mesra sebanyak RM150,000 ('perjanjian pinjaman') antara Fast Aid sebagai pemberi pinjaman dan Moo sebagai peminjam; dan (b) perjanjian jual beli antara Moo sebagai penjual dan Fast Aid sebagai pembeli tanah dengan harga RM1 juta. Selepas itu, pada 1 Februari 2017, Fast Aid memeterai perjanjian jual beli dengan Ng Chee Kui dan Ng Chee Cheong ('Ng') untuk menjual tanah tersebut dengan harga RM1,803,960. Perjanjian itu menyatakan bahawa Fast Aid adalah pemilik tanah yang berkepentingan berdasarkan perjanjian terakhir dengan Moo. Ng membayar Fast Aid RM180,396 di bawah perjanjian dan harga baki RM1,623,564 telah diserahkan kepada peguam mereka sebagai pemegang kepentingan. Pada bulan Februari 2017, Agro Bank memberitahu Moo bahawa Jasber, Nur & Lee telah meminta penyataan penebusan untuk penebusan kemudahan pinjaman Agro Bank dengan tanah tersebut. Moo dan Woo memberitahu Agro Bank bahawa tidak ada kesepakatan sama sekali oleh mereka untuk menjual tanah tersebut kepada Fast Aid dan/atau mana-mana pihak dan mengarahkan Agro Bank untuk tidak melepaskan penyataan penebusan. Akibatnya, Fast Aid tidak dapat melanjutkan untuk menyelesaikan perjanjian jual beli dengan Ng. Oleh itu, pada bulan Disember 2017, Ng memulakan Guaman 741 untuk pelaksanaan spesifik perjanjian jual beli antara mereka dan Fast Aid dan menambahkan Moo dan Woo sebagai defendan bersama. Pada bulan Mac 2018, Moo dan Woo memulakan Guaman 138 untuk membatalkan perjanjian pinjaman dan perjanjian jual beli dengan Fast Aid.

Diputuskan:

(1) Seksyen 91 dan 92 Akta Keterangan 1950 tidak menghalang Moo/Woo memberikan keterangan lisan untuk menunjukkan bahawa mereka sebenarnya tidak menerima RM150,000 daripada Fast Aid. Janji Moo dalam perjanjian pinjaman untuk membayar balik pinjaman dan janjinya untuk menjual tanah itu kepada Fast Aid jika dia gagal membayar balik pinjaman, oleh itu dibuat tanpa balasan. Kedua-dua perjanjian antara Moo/Woo dan Fast Aid akan terbatal kecuali ada keterangan yang menunjukkan Abdul Aziz telah menyerahhakkan hutang Moo kepada Fast Aid. Tuntutan Fast Aid bahawa ada penyerahhakkan adalah tidak berasas. Sebenarnya, keterangan menunjukkan yang bertentangan. Oleh itu, perjanjian jual beli dan perjanjian pinjaman antara Moo/Woo dan Fast Aid adalah tidak sah dan tidak dapat dilaksanakan kerana tiada balasan (lihat perenggan 32, 34 & 38).

(2) First Aid tidak mempunyai hak sah atau berkepentingan di tanah tersebut dan oleh itu tidak dapat menjualnya kepada Ng. Oleh itu, Ng tidak dapat memohon pelaksanaan khusus perjanjian jual beli dengan

Fast Aid, dan hanya dapat memohon pengembalian dana dari semua wang yang dibayar berdasarkan perjanjian tersebut. First Aid juga gagal melepaskan beban membuktikan bahawa tuntutan Ng untuk ganti rugi jumlah tertentu berjumlah RM180,396 adalah berlebihan, terlalu tinggi atau tidak masuk akal. Oleh itu, tuntutan Ng untuk ganti rugi jumlah tertentu dibenarkan (lihat perenggan 41 & 46).]

Cases referred to

Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 6 MLJ 15, FC (refd)

Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290; [1984] 1 CLJ Rep 123, FC (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Contracts Act 1950 s 26
Evidence Act 1950 ss 91, 92
National Land Code Form 14

Teoh Soo Jin (Marcus Chua & Co) for the plaintiff.
Dhanaraj (Kalai Selvi PM Muthu and Malar Loganathan with him) (Kamil Hashim Raj & Lim) for the first defendant.
Wong Chin Fung Steven (Muhammad Azim Che Omar with him) (Ariffin & Partners) for the third and fourth defendants.

SM Komathy J:

THE TRIAL

[1] By consent of the parties, Civil Suit Nos 22NCVC-741–12 of 2017 and 22NCVC-138–03 of 2018 were consolidated and heard together. This case concerns a piece of agricultural land held under Hakmilik HSM 3, Lot 2161, in Mukim Beranan, Hulu Langat ('the land') which belonged to Moo Ooi Peng ('Moo').

[2] In Civil Suit No 22 NCVC-741–12 of 2017:

(a) the plaintiffs are Ng Chee Kui and Ng Chee Cheong;

(b) the first defendant is Fast Aid Medical (M) Sdn Bhd;

(c) the second defendant is Bank Pertanian Malaysia Bhd; and

(d) the third defendant is Moo and the fourth defendant is Woo Mun Kit.

[3] In Civil Suit No 22 NCVC-138–03 of 2018:

(a) the plaintiffs are Moo and Woo Mun Kit;

(b) the first defendant is Fast Aid Medical (M) Sdn Bhd;

(c) the second defendant is Abdul Aziz bin Mohd Daud; and

(d) the third defendant is a law firm, Messrs Jasbeer, Nur & Lee.

[4] For ease of reference, I shall refer to:

(a) Moo and Woo Mun Kit as 'Moo' and 'Woo' respectively;

(b) Ng Chee Kui and Ng Chee Cheong as 'the Ngs';

(c) Fast Aid Medical (M) Sdn Bhd as 'Fast Aid';

(d) Bank Pertanian Malaysia Bhd as 'Agro Bank';

(e) Abdul Aziz bin Mohd Daud as 'Abdul Aziz'; and

(f) Messrs Jasbeer, Nur & Lee as 'Jasbeer, Nur & Lee'.

BACKGROUND FACTS

[5] Save where otherwise indicated, these facts were all agreed or not disputed.

[6] Moo is the registered proprieter of the land. She and her son, Woo are co borrowers of a loan facility offered by Agro bank for the purpose of financing the purchase of the land.

[7] Moo and her late husband, and Abdul Aziz were directors in a travel and tour company known as Cherry Bird Travel & Tours Sdn Bhd ('Cherry Bird'). Cherry Bird took a loan from Standard Chartered Bank, and the same was guaranteed by Moo, her husband and Abdul Aziz.

[8] In November 2014 Abdul Aziz, settled the loan facility owed by Cherry Bird to Standard Chartered Bank amounting to RM150,000 as the bank had initiated court proceedings against Cherry Bird and the guarantors. Abdul Aziz had resigned from Cherry Bird and was a director with Fast Aid at the material time.

[9] On 30 March 2015, Moo and her son went to Jasber, Nur & Lee's office and signed, inter alia, these documents:

(a) a friendly loan agreement of RM150,000 ('the loan agreement') between Fast Aid as the lender and Moo as borrower; and

A (b) a sale and purchase agreement between Moo as seller and Fast Aid as purchaser of the land for RM1m.

[10] Moo and Woo were not represented whilst Jasber, Nur & Lee acted for Fast Aid in respect of these transactions.

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[11] Subsequently, on 1 February 2017, Fast Aid entered into a sale and purchase agreement with the Ngs' to sell the land for RM1,803,960. The agreement declared that Fast Aid was the beneficial owner of the land by virtue of the latter's agreement with Moo. Jasber, Nur & Lee acted for Fast Aid in this C transaction as well. Ngs' paid Fast Aid RM180,396 under the agreement and the balance purchase price of RM1,623,564 was deposited with their solicitors as stakeholder.

D **[12]** In February 2017, Agro bank notified the Moo that Jasber, Nur & Lee had requested for a redemption statement for the redemption of the Agro bank loan facility vis a vis the land. By letter dated 13 February 2017, Moo and Woo informed Agro Bank that there was no agreement whatsoever by them to sell the land to Fast Aid and/or any party and instructed Agro bank not to release E the redemption statement. As a result, Fast Aid was unable to proceed to complete the sale and purchase agreement with the Ngs. The Ngs' wrote numerous letters to Fast Aid for the completion of the sale and purchase agreement but to no avail. Whereupon, in December 2017, the Ngs instituted Civil Action No 22 NCVC-741–12 of 2017 for specific performance of the F sale and purchase agreement between them and Fast Aid and added Moo and Woo as co defendants.

[13] In March 2018, the Moo and Woo instituted Civil Suit No G 22NCVC-138–03 of 2018 to nullify the loan agreement and sale and purchase agreement with Fast Aid.

[14] To summarise, the three transactions that have led to these proceedings are:

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(a) first transaction: Abdul Aziz's settlement of the Standard Chartered loan facility;

(b) second transaction: the loan agreement and sale and purchase agreement between the Moo/Woo and Fast Aid; and

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(c) third transaction: the sale and purchase agreement between Fast Aid and the Ngs.

CASE FOR MOO/WOO

[15] The Moo and Woo assert the loan agreement and the sale and purchase agreement are void for want of consideration. They allege that they did not receive from Fast Aid the loan of RM150,000 nor the deposit of RM150,000 as stipulated in the agreements.

[16] In the alternative, it is pleaded that Fast Aid, Abdul Aziz and Jasber, Nur & Lee had conspired and falsely represented to them that the agreements were in relation the loan taken by Cherry Bird from Abdul Aziz. They had signed the documents in reliance of this representation. The agreements are thus void for fraudulent misrepresentation.

[17] It is further pleaded that the the sale and purchase agreement between Fast Aid and the Ngs'is void and unenforceable as Fast Aid had no interest in the land to sell it to the Ngs.

CASE FOR FAST AID, ABDUL AZIZ AND JASBER NUR & LEE

[18] It is Fast Aid's and Abdul Aziz's pleaded case that Moo and Woo are bound by the agreements they signed. In the alternative, it is their case that Abdul Aziz settled Cherry Bird's bank loan with Standard Chartered Bank at Moo's request and Abdul Aziz assigned the debt owing to him by Moo to Fast Aid with the consent and knowledge of Moo and Woo. The sale and purchase agreement was signed as an assurance/guarantee that the Moo and Woo would repay the RM150,000 loan within six months, and in the event of default, Fast Aid could sell the land.

[19] It is said that as the Moo defaulted in the repayment of the loan within the agreed time frame, Fast Aid was entitled to enter into the third transaction, ie the sale and purchase agreement with the Ngs'.

CASE FOR THE NGS'

[20] It is the Ngs' case that the sale and purchase agreement between them and Fast Aidis valid and they seek specific performance. It is pleaded that they are bona fide purchasers who have paid consideration, and at all material times unaware of the dispute between the Moo/Woo and Fast Aid. In the alternative, they seek are fund of the monies paid and agreed liquidated damages.

ISSUES TO BE TRIED

[21] The issues to be tried are:

(a) is there consideration for the agreements between Moo/Woo and Fast Aid;

(b) if not, whether there was an assignment of the debt owing to Abdul Aziz by Moo to Fast Aid;

(c) if yes, whether Moo/Woo were falsely led to believe by Fast Aid, Abdul Aziz and Jasber, Nur & Lee that the documents they signed were in relation to the loan taken by Cherry Bird from Abdul Aziz;

(d) if not, whether the Ngs'are entitled to seek specific performance of the sale and purchase Agreement with Fast Aid; and

(e) if not, the damages payable to the Ngs.

WITNESSES

[22] A total of six witnesses testified in this case. The principal witnesses were Moo and Woo, Abdul Aziz, Nanda (who testified for Fast Aid), Dato Jasbeer Singh and his conveyancing clerk, Hamzah bin Hamid. There was a serious conflicts in evidence between the parties. I shall set out my assessment of the principal witnesses in the case.

[23] Moo and Woo did not inspire me as credible witnesses. Their evidence as a whole displayed a tendency to close their mind to any version of the facts that did not accord with their case that Fast Aid was involved in a scheme with Abdul Aziz and Dato Jasbeer Singh to defraud them of the land.

[24] In their evidence, both claimed they were falsely led to believe that the documents they signed had to with Cherry Bird and were denied the opportunity to go through the documents before signing. They also testified that the terms of the agreements were never explained to them. Watching them giving evidence, they did not appear to be persons who would blindly sign documents without knowing the contents.

[25] Their professed ignorance of the documents they signed is incapable of belief considering that they are both educated and literate in English. I reject, similarly, their evidence that they were not given the opportunity to go through the documents before signing or the terms were not explained to them. I felt obliged to treat their evidence with considerable caution. And, in most instances, where their evidence conflicted with that of the other witnesses, I preferred the testimony of the latter.

[26] As for Abdul Aziz, Nanda, Hamzah bin Hamid and Dato Jasbeer Singh, I accepted their evidence and found them to be truthful witnesses as regards the events that led to the execution of the agreements. I accepted their evidence

that Moo and Woo went to the office of Jasbeer, Nur and Lee knowing that Abdul Aziz was desirous of assigning the amount owing by Moo to him to Fast Aid. It appeared that parties proceeded with the execution of the agreements on the basis there was an assignment agreement.

[27] I turn now to consider the issues that have fallen for decision in this case.

TOTAL FAILURE OF CONSIDERATION

[28] It is the contention of Moo/Woo that the loan agreement and sale and purchase agreement with Fast Aid are void for lack of consideration as they did not receive any monies from Fast Aid. It is pointed out that Nanda had acknowledged under cross examination that it was Abdul Aziz who had given the loan to Woo and that Fast Aid did not pay any monies to her. It is said that Nanda's admission would render both the agreements null and void for lack of consideration.

[29] In riposte, Fast Aid and Abdul Aziz make two points. First, they take the position that by reason of ss 91–92 of the Evidence Act 1950, Moo and Woo were bound by the agreements they had signed. It is pointed out that as Moo had acknowledged the receipt of the loan and deposit in the agreements, she could not give oral evidence to prove that no consideration has been received.

[30] In the alternative, it is submitted that the loan owing to Abdul Azizby Moo had been assigned to Fast Aid. Moo was notified of the same and for this reason had come to the lawyer's office to sign the two agreements. Fast Aid and Abdul Aziz argued that there is no requirement in law for the assignment to be pleaded as this was an internal arrangement between Fast Aid and Abdul Aziz.

[31] I shall deal first with the argument advanced by Fast Aid and Abdul Aziz that Moo is estopped by ss 91–92 from proving that no consideration was paid to her. The same issue was canvassed before the Federal Court in *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290; [1984] 1 CLJ Rep 123. In rejecting it, the court held:

> Although cl 3 of exh P1 appears to contain an acknowledgment by the plaintiff of the receipt of the sum of RM10,000 from the defendant at the time of the signing of the contract, it was submitted by learned Counsel that the plaintiff was not estopped by ss 91 and 92 to adduce evidence that the RM10,000 was in fact not paid to or received by her. Authority for such a proposition may be found in the Privy Council case of *Sah Lal Chand v Indarjit* [1899-00] 27 IA 93, where it was held that: (i) s 91 of the Indian Evidence Act (which is in the same terms with s 92 of our Evidence Act 1950) does not preclude oral evidence to contradict a recital of fact in a written contract; and (ii) it is settled law that, notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. If it was not so,

facilities would be afforded for the grossest frauds. In our judgment, the learned judicial commissioner was therefore wrong in law to shut out the oral testimony of the plaintiff that she did not in fact receive the RM10,000 from the defendant at the time of signing of exh P1 or at any time thereafter. Since the plaintiff had expressly denied receiving the RM10,000 from the defendant and in the absence of any evidence that PW2 paid over the RM10,000 to the plaintiff, the finding of the learned judicial commissioner by way of inference, that the plaintiff had received the deposit of RM10,000 could not be supported. Based on the finding of the court the RM10,000 was and appears to be still being retained by PW2.

[32] It is clear from the foregoing that ss 91–92 of the Evidence Act do not preclude Moo/Woo giving oral evidence to show that they did not in fact receive the RM150,000 from Fast Aid. On the basis of Nanda's evidence, I find as a fact that the RM150,000 was not paid or received by Moo/Woo from Fast Aid. Moo's promise in the loan agreement to repay the loan and her promise to sell the land to Fast Aid if she defaulted in the repayment of the loan, were thus made without consideration.

[33] Section 26 of the Contracts Act 1950 provides that an agreement without consideration is void unless it falls within any of the three exceptions provided therein. The provision reads:

> An agreement made without consideration is void, unless:
>
> (a) It is in writing and registered;
>
> It is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents and is made on account of natural love and affection between parties standing in a near relation to each other;
>
> (b) Or is a promise to compensate for something done;
>
> It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or
>
> (c) Or a promise to pay a debt barred by limitation;
>
> It is a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

[34] It is clear on the facts that the exceptions do not apply here. It would follow that the two agreements between Moo/Woo and Fast Aid would be void unless there is evidence to show Abdul Aziz had assigned Moo's debt to Fast Aid.

[35] The pivotal issue here is whether there is evidence to supports Abdul

Aziz's and Fast Aid's claim that there was an assignment. Pursuant to s 4(3) of the Civil Law Act 1956 a legal assignment is valid once the assignment is made in writing and notice of the same had been given to the debtor. The section reads:

> Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[36] Moo/Woo deny there was an assignment, whilst Abdul Aziz and Nanda testified otherwise. According to Dato Jasbeer, when Nanda and Abdul Aziz approached him to prepare the loan agreement and the sale and purchase agreement, they had informed him that they would instruct lawyers to prepare the documentation for the assignment. However, no such assignment agreement was produced. Nor is there any mention of any assignment in the agreements.

[37] It cannot be gainsaid that if there had been an assignment agreement or deed, upon its execution, it would have transferred Abdul Aziz's right to recover Moo's debt to Fast Aid and Fast Aid would have stepped into his shoes to pursue his claim. The assignment would have precluded Abdul Aziz from bringing any action to recover the loan owing to him by Moo. There is an important piece of evidence in this case which demolishes Fast Aid's and Abdul Aziz's allegation of the existence of an assignment agreement. It is undisputed Abdul Aziz had in March 2018 issued proceedings against Cherry Bird to recover the RM150,000 he paid to settle the latter's loan facility with standard Chartered. If indeed there had been an assignment, why was Abdul Aziz suing Cherry Bird? This required an explanation but none was given.

[38] In the premises, I find Fast Aid's claim there was an assignment unsubstantiated. In fact, the evidence is to the contrary. It follows from my finding that the sale and purchase agreement and loan agreement between Moo/Woo and Fast Aid are void and unenforceable for lack of consideration.

[39] It is strictly therefore not necessary for the court to consider the remaining issues. However in deference to the lengthy submissions made by the parties I will deal with them briefly. I take the issue of false misrepresentation first. I find Moo/Woo's allegation that Abdul Aziz and

Jasber, Nur & Lee had conspired and falsely represented to them that the agreements were in relation the loan taken by Cherry Bird from Abdul Aziz to be unconvincing and untrue. I am satisfied and find that there is no truth whatsoever in Moo/Woo's allegation based on misrepresentation and that it has been put forward by them with a view to lend false support to their case.

[40] There is one other matter that I must address. It is in evidence that apart from the loan agreement or the sale and purchase agreement, Moo had also signed a few transfer forms. Moo in her evidence testified she had never signed the Form 14 in respect of the direct transfer of the land from her to the Ngs. She had only signed the transfer form for the land from her to Fast Aid. The allegation of forgery is neither pleaded nor raised in the list of agreed issues to be tried. The court was informed and the case only proceeded on the basis the agreements were void for lack of consideration and fraudulent misrepresentation. There is a long line of case and it is established law that the court should not decide a case based on unpleaded issue. For this reason, I ruled that Moo/Woo could not rely on this ground to invalidate the agreements.

THE NGS CLAIM

[41] That brings me to the Ngs claim for specific performance of their sale and purchase agreement with Fast Aid. Given my finding that the sale and purchase agreement between Moo And Fast Aid and is void and unenforceable, it would follow that Fast Aid had no legal or beneficial interest interest in the land and could not therefore contract to sell it to the Ngs. The Ngs cannot thus seek specific performance of the sale and purchase agreement with Fast Aid, and can only seek for a refund of all monies paid under the agreement. Fast Aid accepts the position that the Ngs are entitled to the refund of all monies in view of the court's finding that the sale and purchase agreement between Moo And Fast Aid is void and unenforceable.

[42] The Ngs also seek agreed liquidated damages of RM180,396 as provided in cl 2.13 of the sale and purchase agreement. Fast Aid resisted the claim and took the position that no liquidated damages is payable as its non performance of its obligations under the agreement was due to circumstances beyond its control. It submitted that by operation of cll 2.14 and 2.15.1 (the force majeure clause) of the sale and purchase agreement, it is relieved of the obligation to pay liquidated damages. Fast Aid further submitted that it would be unfair to require it to pay liquidated damages when the non completion of the agreement was due to the refusal of Agro Bank to release the redemption statement on the objections of Moo and Woo.

[43] It would be useful if I set out cl 2.14:

> In the event that the transfer of the said Land in favour of Purchaser (s) is rejected ... for any non-rectifiable reason not due to any default, wilful neglect, omission or blameworthy or either party ... in such case the Vendor shall refund free of interest to the purchaser all such as have been paid by purchaser towards the purchase price under the provisions of this Agreement ...

[44] I find myself unable to agree with the submission taken by Fast Aid. On a reading of cl 2.14, it is clear that it can only be invoked in a scenario where the land office rejects Fast Aid's application to transfer the land to the Ngs. That is not the case here. I also fail to see how cl 2.15.1 applies to the facts here.

[45] In *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15, the Federal Court made the following observation in relation agreed damages clause:

> With respect and for reasons we shall set out below, we are of the view that there is no necessity for proof of actual loss or damage in every case where the innocent party seeks to enforce a damages clause. *Selva Kumar* and *Johor Coastal* should not be interpreted (as what the subsequent decisions since then have done) as imposing a legal straightjacket in which proof of actual loss is the sole conclusive determinant of reasonable compensation. Reasonable compensation is not confined to actual loss, although evidence of that may be a useful starting point.
>
> As for our reasons, we begin by saying that in view of the legislative history of s 75 of the Act which need not be elaborated in this judgment, we are of the considered opinion that there is nothing objectionable in holding that the concepts of 'legitimate interest' and 'proportionality' as enunciated in *Cavendish* are relevant in deciding what amounts to 'reasonable compensation' as stipulated in s 75 of the Act.Ultimately, the central feature of both the *Cavendish case and* s 75 of the Act isthe notion of reasonableness. Indeed, the *Parking Eye v Beavis* [2015] UKSC 67 judgment is replete with instances where the United Kingdom Supreme Court conflated 'proportionality' with 'reasonableness' (see: *Parking Eye* at paras [98], [100], [108], [113] and [193]).
>
> Consequently, regardless of whether the damage is quantifiable or otherwise, it is incumbent upon the court to adopt a common sense approach by taking into account the legitimate interest which an innocent party may have and the proportionality of a damages clause in determining reasonable compensation. This means that in a straightforward case, reasonable compensation can be deduced by comparing the amount that would be payable on breach with the loss that might be sustained if indeed the breach occurred (emphasis added). Thus, to derive reasonable compensation, there must not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party.
>
> We turn now to the issue on burden of proof. The initial onus lies on the party seeking to enforce a clause under s 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in

A the contract irrespective of whether actual damage or loss is proven, subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.

If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause is unreasonable
B or to demonstrate from available evidence and under such circumstances what comprises reasonable compensation caused by the breach of contract. Failing to discharge that burden, or in the absence of cogent evidence suggesting exorbitance or unconscionability of the agreed damages clause, the parties who have equality of opportunity for understanding and insisting upon their rights must be taken to have freely, deliberately and mutually consented to the contractual clause seeking to
C pre-allocate damages and hence the compensation stipulated in the contract ought to be upheld.

[46] In the instant case, Fast Aid failed to discharge its burden of proving that
D the Ngs claim for liquidated damages in the sum of RM180,396 was excessive, exorbitant or unreasonable. In the premises, I allow the claim of the Ngs for liquidated damages.

CONCLUSION

E

[47] For the reasons given, the Moo/Woo's claim is allowed with costs of RM20,000. I also allow the Ngs claim for refund of all monies with costs of RM10,000.

F *Order accordingly.*

Reported by Ahmad Ismail Illman Mohd Razali

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